



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
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To: Interested Persons

From: Jonathan Wayne, Executive Director

Date: October 8, 2004

Re: Advisory Statement Regarding Independent Expenditures

In 2003, the Legislature enacted Chapter 448 of the Public Laws of 2003 (L.D. 1169) which amended the section of the Election Law concerning independent expenditures. In response to recently posed questions about how the Ethics Commission will interpret the change in the law, this memo is intended to offer an overview of independent expenditures and to provide guidance about how the Commission intends to interpret the new law in the 2004 elections. The advice in this memo is not binding on the Commission, and the Commission will judge each matter brought before it on a case-by-case basis. A copy of the relevant section as amended (21-A M.R.S.A. §1019-B) is attached.

2003 Change in the Law: New Rebuttable Presumption

Under the former law, the term “independent expenditure” referred only to expenditures that expressly advocate the election or defeat of a clearly identified candidate.

As amended in 2003, Section 1019-B continues this definition, but it also adds a presumption that applies to communications “disseminated” in the last 21 days before an election. Any expenditure made to design, produce, or disseminate a communication that names or depicts a clearly identified candidate and that is disseminated in the 21-day period will be presumed to be an independent expenditure if the candidate is involved in a race in which a Maine Clean Election Act candidate is running.

The person making the expenditure may attempt to rebut the presumption by filing a signed written statement within 48 hours of making the expenditure that the cost was not incurred with the intent to influence the election, supported by any additional evidence that the person chooses to submit. The Commission must then determine by a

preponderance of the evidence whether the cost was incurred with the intent to influence the nomination, election, or defeat of a candidate.

The change in the law also amended the threshold amount that triggers an obligation to file an independent expenditure report from \$50 to \$100 per candidate, so any amount spent that is \$100 or less per candidate is not required to be reported.

Frequently Asked Questions Regarding Independent Expenditures

How do I report independent expenditures?

The Commission has developed a special reporting form that must be used to report independent expenditures. It is available on the Commission's Web site at www.maine.gov/ethics. The form requests that the filer report the date, amount, payee and purpose of the expenditure, and to allocate the cost among the different candidates affected by the expenditure, indicating whether the expenditure was made in support of or in opposition to each candidate. The Election Law requires the report to contain a sworn statement disclosing whether the expenditure was made in cooperation or consultation with the candidate.

If the expenditure is greater than \$250 per candidate, the report must be filed within 24 hours of making the expenditure. If the expenditure is greater than \$100 but not more than \$250 per candidate, it must be reported according to the schedule on the cover page of the independent expenditure report.

The independent expenditure report is available on the Commission's Web site or by telephoning the Commission staff at 287-4179.

Can I file an independent expenditure report electronically or by fax?

Filers may submit the reports by fax to (207) 287-6775, provided that the original report is received by the Commission within five calendar days. Unfortunately, the Commission cannot accept independent expenditure reports electronically on the Commission's Web site. Section 1019-B requires the independent expenditure report to include a notarized statement disclosing whether the expenditure was made in cooperation or consultation with the candidate, and it is not possible to comply with that requirement through electronic filing.

Do I have to file an independent expenditure report on a Saturday or Sunday?

If the 24-hour deadline for an independent expenditure report falls on a weekend or holiday, the report must be filed on that day. On the Saturday and Sunday before an election, the Commission office is open and staffed from 8:00 to 5:30 for filing.

If I make an independent expenditure, how does that affect a Maine Clean Election Act candidate?

Independent expenditures are included in the Ethics Commission's determination of whether a Maine Clean Election Act candidate is entitled to receive matching funds. For example, if Candidate A and Candidate B (a Maine Clean Election Act candidate) are opponents in the general election, and a political action committee (PAC) makes an independent expenditure in support of Candidate A, her opponent B may be entitled to receive matching funds. This is true even if Candidate A is participating in the Maine Clean Election Act.

What if I enter into an obligation to make a payment for goods and services? Do I have to report the obligation as an independent expenditure before I pay the vendor?

The legal definition of expenditure includes not just the making of a payment but also "[a] contract, promise or agreement, expressed or implied, whether or not legally enforceable, to make any expenditure." (21-A M.R.S.A. §1012(3)(A)(3)) The Commission views this as requiring the reporting of an obligation. The Maine Clean Election Act explicitly requires that "obligations" be considered when determining whether a Maine Clean Election Act candidate is entitled to receive matching funds.

Does making an independent expenditure turn me or my organization into a political action committee?

No. Any individual or organization may make an independent expenditure. Only those organizations that meet the legal definition of a PAC (21-A M.R.S.A. §1051(5)) must register and file regular campaign finance reports as a PAC.

I have heard that I should not coordinate my spending with the candidate I want to support. Why?

Independent expenditures must be independent of the candidate. Any expenditure made by a third-party in consultation or cooperation with a candidate is considered to be a contribution to the candidate and is not an independent expenditure. For example, if a supporter wants to place an ad supporting a candidate in the local newspaper and asks the candidate to supply him with a campaign photograph, the cost of the ad would be considered a contribution to the candidate. The cost would have to be reported by the candidate, and the supporter would not be required to file an independent expenditure report.

How do I know if my advertisement or literature “expressly advocates” the election or defeat of a candidate?

The term “expressly advocate” is defined in Chapter 1, Section 8(2)(B) of the Commission Rules. The definition includes phrases such as “Jones for House of Representatives” or “Vote for the Governor”, and other words which in context can have no reasonable meaning other than to urge the election or defeat of one or more clearly identified candidates.

Interpreting the Change in the Independent Expenditure Law

What communications are covered by the rebuttable presumption in Section 1019-B?

Based on the legislative history of Chapter 448, the Commission believes that the law was designed to apply to written and oral communications intended to influence the nomination, election, or defeat of a candidate, including:

- Printed advertisements in newspapers and other media
- Television and radio advertisements
- Printed literature
- Recorded telephone messages
- Scripted telephone messages by live callers

However, any expenditure that has all of the following four elements is covered by the rebuttable presumption:

- an expenditure made to design, produce, or disseminate a communication
- that is disseminated in the last 21 days before an election, and
- that names or depicts a clearly identified candidate
- who is in a race involving a Maine Clean Election Act candidate.

If the expenditure is covered by the presumption and is greater than \$100 per candidate, the party making the expenditure must either file an independent expenditure report or a signed statement that the expenditure was not made with the intent to influence the election.

Are expenditures made before the 21-day period covered by the presumption?

In the Commission’s view, the 21-day period applies to when the communication is disseminated, not when the expenditure is made. Therefore, if expenditures are made before the 21-day period to design or produce a communication that is then disseminated during the 21-day period, the expenditure may nevertheless be covered by the

presumption, and the costs of designing, producing, and disseminating the communication must be reported.

How do I rebut the presumption?

Parties wishing to rebut the presumption must file a written statement that the expenditure was not made in order to influence the election. As a convenience, the Ethics Commission has developed a form that may be used for this purpose but using the form is not mandatory. Any party filing a rebuttal statement is welcome to include any evidence that it believes is relevant. It is acceptable to file the rebuttal statement by faxing it to (207) 287-6775. Please note that if the 48-hour deadline falls on a weekend, the report must be filed on a Saturday or a Sunday. The Commission office will be open and staffed on the weekend before the November 2, 2004 general election.

If a party has a specific communication that appears to be covered by the presumption and it believes that the communication is not intended to influence the nomination, election or defeat of a candidate, the party may submit the rebuttal statement to the Commission in advance of disseminating the communication for an early determination. The request must include the complete communication and be specific as to when and to whom the communication will be disseminated.

While there is no penalty for failing to file a statement rebutting the presumption within 48 hours, if the Commission determines that the communication was covered by the presumption and an Independent Expenditure Report was not filed on time, the party making the expenditure could be assessed a penalty for late filing.

The Commission will take into consideration any evidence relevant under the statute, including the following:

- Does the language of the communication appear designed to influence the nomination, election, or defeat of a candidate?
- Was the communication disseminated to voters in the district of the candidate(s) mentioned in the communication?
- Was the communication disseminated to voters in other districts?
- How many voters received the communication?
- Is the communication directed to voters at all?
- Does the communication seem primarily designed for some identifiable purpose other than influencing the nomination, election, or defeat of a candidate?
- Does the communication mention all candidates running in the district?
- When was the communication produced, and when was it distributed?

What if the cost of disseminating a communication (including the value of any written materials received) is less than \$100 per candidate?

The definition of independent expenditure applies only to expenditures for communications. If the party making the communication did not spend or obligate more than \$100 per candidate to design, produce, or disseminate the communication and received nothing with a value exceeding \$100 per candidate from any other party in connection with the communication, no independent expenditure report or rebuttal statement is necessary.

Example: a community organization maintains a list of e-mail addresses of individuals who are concerned about local economic development issues. At no cost, it sends an e-mail to the concerned citizens endorsing a legislative candidate. The organization would not be required to file an independent expenditure report or submit a rebuttal statement because the communication involved no expense.

Are there any expenditures that are exempt from the reporting requirement and the rebuttable presumption?

Certain election-related activities are excluded from the legal definition of “expenditure” in the Election Law. Because these activities are not considered expenditures, they do not need to be reported as independent expenditures and the rebuttable presumption does not apply to them. These excluded costs include:

- News stories and editorials distributed through a broadcasting station, newspaper, or other periodical;
- Any communication from a membership organization (*e.g.*, a union or trade association) or corporation to its members or stockholders if that organization is not organized primarily for the purpose of influencing the nomination or election of any person for state or county office;
- Activity or communication designed to encourage individuals to register to vote or to vote if that activity or communication does not mention a clearly identified candidate;
- The use of offices, telephones, computers, or similar equipment when that use does not result in additional cost to the provider; and
- The payment by a party committee of the costs of preparation, display or mailing or other distribution of a printed slate card or sample ballot, or other printed listing, of three or more candidates.

For a full list of payments and obligations exempted from the legal definition of “expenditure”, *see* 21-A M.R.S.A. §1012(3)(B).

Are telephone communications covered by the rebuttable presumption?

In the view of the Commission, the rebuttable presumption in Section 1019-B would cover automated telephone messages and calls from live individuals that are scripted, if the communications have the four elements described above on page 4.

Are there any individuals or organizations that are exempt from the rebuttable presumption?

Section 1019-B does not exempt any category of individuals or organizations from the rebuttable presumption. Nevertheless, as noted above, many costs by membership and news organizations are excluded from the legal definition of expenditures, and therefore are not covered by the independent expenditure law.

Does my membership organization have to report its communications to its members?

The Election Law contains an exemption for membership organizations that are not organized primarily for the purpose of influencing an election. Communications from those organizations to their members are not considered expenditures, and therefore are not considered independent expenditures. If the communications expressly advocate the election or defeat of a candidate, the expenditures must be disclosed in a special report required by 21-A M.R.S.A. §1019-A. Those expenditures, however, will not trigger matching funds under the Maine Clean Election Act.

What if the costs of producing the communication are paid for by an organization that is different than the organization that disseminates the communication? Which organization must file an independent expenditure report or a rebuttal statement?

Some of the questions posed to the Commission suggest that organizations may purchase or produce copies of a written communication (such as a legislative scorecard or voting record) and provide them to another organization that will distribute them. Persons paying for *or* disseminating communications covered by the presumption will be expected to demonstrate a high degree of good faith to ensure that all design, production, and distribution costs are reported to the Commission so that the correct amount of matching funds will be received by MCEA candidates.

An organization that has been supplied printed communications covered by the presumption and that distributes them must report *both* its own distribution costs *and* the value of the materials it has distributed. The Commission requests that the organization make a good faith effort to determine the value of the materials by ascertaining the *actual* design and production costs of the materials distributed. If the actual costs cannot be determined with a reasonable effort, the organization should estimate the fair market value of the materials it has distributed. Both the distributions costs and the value of the materials must be included in the Independent Expenditure report, unless the organization has filed a rebuttal statement.

Example: a PAC receives 500 copies of campaign literature regarding a candidate that it distributes one week before the general election in order to influence the outcome of the election. By checking with the party that supplied the literature, the PAC determines that the actual design and production costs of the literature was \$400. The PAC spends \$200 distributing the literature. The PAC should file an independent expenditure report with a total expenditure of \$600.

What about legislative scorecards or voting records of legislators?

Some organizations produce literature that summarizes legislators' voting records on particular issues and rates the legislators on their voting records. If these communications have the four elements of the rebuttable presumption described above, the party paying for or disseminating the literature will be required to file either an independent expenditure report or a written statement rebutting the presumption. The Commission will consider each rebuttal statement on a case-by-case basis. The determination will depend on the factors listed above, and any other evidence deemed relevant by the Commission. As noted above, many membership communications are not covered by the rebuttable presumption.

Are communications designed to encourage individuals to register to vote or to vote covered by the presumption?

The Election Law excludes from the legal definition of expenditure "activity or communication designed to encourage individuals to register to vote or to vote if that activity or communication does not mention a clearly identified candidate". (21-A M.R.S.A. §1012(2)(B)(10)) Those communications are not covered by the rebuttable presumption. If communications designed to encourage individuals to register to vote or to vote name or depict a clearly identified candidate and meet the other requirements of the presumption (including the \$100 per candidate threshold), the party making the expenditure may rebut the presumption by filing a written statement explaining that the materials were distributed for the purpose of encouraging voting or registration and were not intended to influence the election.

Are polling, voter surveys, and public opinion research covered by the presumption?

The Commission believes that scripted conversations made by live telephone callers within the last 21 days before an election could be covered by the rebuttable presumption. If a public opinion survey within the last 21 days before an election contains references to a candidate, and the party funding the survey believes that the references were not made with the intent to influence the election, the organization should file a rebuttal statement. If a survey relates to a public issue and does not mention a candidate's name, it is not subject to the presumption and no report or rebuttal notice must be filed. If public opinion research (e.g., voter identification information) is

contributed to a PAC to influence an election, the PAC must report the research as an in-kind contribution including the fair market value of the research.

Are Section 527 Organizations covered by the law?

So-called Section 527 organizations are subject to the Maine Election Law if they raise or spend money regarding state candidates in Maine. This includes Section 527 organizations that are organized outside the State of Maine. If a Section 527 organization makes an expenditure that is covered by the rebuttable presumption, it is required to file an independent expenditure report or a rebuttal statement.

What is the consequence of filing an independent expenditure report late?

The late filing of an independent expenditure report can result in the assessment of a civil penalty under 21-A M.R.S.A. §1020-A(4).

How Can I Get More Advice?

You are welcome to telephone or write the Commission staff at the above telephone number or address.

21-A M.R.S.A. §1019-B. Reports of independent Expenditures

1. Independent expenditures; definition. For the purposes of this section, an "independent expenditure":

A. Is any expenditure made by a person, party committee, political committee or political action committee, other than by contribution to a candidate or a candidate's authorized political committee, for any communication that expressly advocates the election or defeat of a clearly identified candidate; and

B. Is presumed in races involving a candidate who is certified as a Maine Clean Election Act candidate under section 1125, subsection 5 to be any expenditure made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and is disseminated during the 21 days, including election day, before a primary election; the 21 days, including election day, before a general election; or during a special election until and on election day.

2. Rebutting presumption. A person presumed under this section to have made an independent expenditure may rebut the presumption by filing a signed written statement with the commission within 48 hours of making the expenditure stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person chooses to submit. The commission may gather any additional evidence it deems relevant and material and must determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.

3. Report required; content; rules. A person, party committee, political committee or political action committee that makes independent expenditures aggregating in excess of \$100 during any one candidate's election shall file a report with the commission. In the case of a municipal election, a copy of the same information must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements and matching fund provisions under chapter 14. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

B. A report required by this subsection must contain an itemized account of each contribution or expenditure aggregating in excess of \$100 in any one candidate's election, the date and purpose of each contribution or expenditure and the name of each payee or creditor. The report must state whether the contribution or expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17-A, section 451, a statement under oath or affirmation whether the contribution or expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate.

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form.